

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

INDIAN HARBOR INSURANCE COMPANY

Plaintiff,

VS.

KB LONE STAR, INC. F/K/A LONE
STAR AND L.P. F/K/A KAUFMAN &
BROAD LONE STAR, L.P.

Defendants.

❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧ ❧

CIVIL ACTION NO. 4:11-cv-1846

**DEFENDANTS' MOTION TO DISMISS PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(B)(7)**

Defendants KB HOME Lone Star Inc., KB HOME Lone Star L.P., KB Lone Star, Inc., Lone Star, L.P., and Kaufman & Broad Lone Star, L.P. (collectively, “KB”) file this motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7) (failure to join a party under Rule 19).

ERIK D. BUZZARD
ATTORNEY-IN-CHARGE
Texas State Bar No. 24067954
Southern District Bar No. *Pending*
PALUMBO BERGSTROM LLP
17902 Von Karman Ave., Suite 500
Irvine, CA 92614
Telephone: (877) 882-1979
Facsimile: (877) 251-1331
ATTORNEYS FOR DEFENDANTS KB HOME
Lone Star Inc., KB HOME Lone Star L.P., KB
Lone Star, Inc., Lone Star, L.P., and Kaufman &
Broad Lone Star, L.P.

ROBERT (BOB) BROWN
LOCAL COUNSEL
Texas State Bar No. 03164715
Southern District Bar No. 12854
DONATO, MINX, BROWN & POOL, P.C.
3200 SOUTHWEST FREEWAY, SUITE 2300
HOUSTON, TEXAS 77027
OFFICE 713-877-1112
FAX 713-871-1165

TABLE OF CONTENTS

INTRODUCTION.....	1
MEET AND CONFER AVERMENT.....	1
FACTUAL BACKGROUND	2
ISSUES PRESENTED	4
STANDARDS OF REVIEW	4
ARGUMENT.....	5
A. The Court Should Dismiss Indian Harbor’s Claims in Their Entirety Pursuant to FRCP 12(b)(7) and based on Plaintiff’s Improper Forum Shopping.....	5
1. The DJA Should be Dismissed Pursuant to FRCP 12(b)(7).....	5
2. The DJA Should be Dismissed as Indian Harbor is Improperly Forum Shopping.....	9
CONCLUSION	11
CERTIFICATE OF SERVICE.....	12

TABLE OF AUTHORITIES

<i>Campbell v. Triangle Corp</i> 56 FRD 480, 16 FR Serv 2d 649 (1972, ED Pa).....	6
<i>DB Entm’t v. Windle</i> 927 S.W.2d 283, 288 (Tex. App.—Fort Worth 1996, orig. proceeding [mand.dism’d])....	9
<i>Doty v. St. Mary Parish Land Co.</i> 598 F2d 855, 27 FR Serv 2d 978, 64 OGR 277 (1979, CA5 La).....	7
<i>Freeman v. Marine Midland Bank-New York</i> 419 F Supp 440, CCH Fed Secur L Rep P 95685 (1976, ED NY).....	6
<i>H & H International Corp. v. J. Pellechia Trucking, Inc.</i> 119 FRD 352 (1988, SD NY).....	5
<i>Heinrich v. Goodyear Tire & Rubber Co.</i> 532 F. Supp 1348, 33 FR Serv 2d 1117 (1982, DC Md).....	4
<i>Indian Harbor Ins. Co. v. Valley Forge Ins. Grp.,</i> 535 F.3d 359 (5th Cir. 2008).....	6
<i>In re Houston Nw. Partners, Ltd.</i> 98 S.W.3d 777, 780 (Tex. App.—Austin 2003, orig. proceeding [mand. Dism’d])	9
<i>Morrell v. McFarland</i> 527 F. Supp 324 (1981, ND W Va).....	4
<i>Reliant Energy, Inc. v. Gonzalez</i> 102 S.W.3d 868, 875 (Tex. App.—Houston [1st Dist.] 2003), aff’d, 159 W.W.3d 615 (Tex. 2005).....	9
<i>Rojas v. Loewen Group Int’l</i> 178 FRD 356 (1998 DC Puerto Rico).....	5
<i>Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.</i> 592 F.3d 687, 695 (5th Cir. 2010).....	6,8
<i>Walker v. Packer</i> 827 S.W.2d 833, 849 n.3 (Tex 1992).....	9

FEDERAL STATUTES

FED. R. CIV. P. 12(b) (7).....	1,4,5
FED. R. CIV. P. 19(a).....	4,5
FED. R. CIV. P. 19(b).....	5